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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

20 Cung Le, Nathan Quarry, Jon Fitch, Brandon
21 Vera, Luis Javier Vazquez, and Kyle
Kingsbury on behalf of themselves and all
others similarly situated.

Case No.: 2:15-cv-01045-RFB-(PAL)

**DEFENDANT ZUFFA, LLC'S
OPPOSITION TO PLAINTIFFS'
MOTION TO CHALLENGE
ATTORNEY-CLIENT PRIVILEGE
(ECF No. 320)**

[FILED UNDER SEAL]

24 Zuffa, LLC, d/b/a Ultimate Fighting
25 Championship and UFC,

Defendant.

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	FACTS	2
A.	The [REDACTED] By In-House Counsel, Michael Mersch, And Related Email Correspondence	2
B.	Email Correspondence Concerning [REDACTED] [REDACTED]	3
C.	Zuffa's Clawback Of The Privileged Documents	4
III.	ARGUMENT	5
A.	Legal Standard	5
B.	Mr. Mersch's [REDACTED] Is Privileged	7
1.	The [REDACTED] From Zuffa's In-House Counsel To Zuffa's CEO Is A Legal Analysis Of Contractual Language	7
2.	The [REDACTED] Is Privileged	15
C.	The E-mails Related To [REDACTED] Contain Privileged Attorney-Client Communications	16
D.	The [REDACTED] Contain Privileged Attorney-Client Communications, And Zuffa Did Not Waive That Privilege	18
1.	The [REDACTED] Contain Privileged Attorney-Client Communications	18
2.	Zuffa's Production Of Business Communications On The Same Subject Does Not Waive Privilege	19
E.	Plaintiffs Will Not Be Prejudiced As A Result of Zuffa's Privilege Claim Over The Challenged Documents	21
III.	CONCLUSION	22

TABLE OF AUTHORITIES

CASES

3	<i>Brincko v. Rio Properties, Inc.</i> , 278 F.R.D. 576 (D. Nev. 2011).....	5
4		
5	<i>Churchill v. Trinity Universal Ins. Co.</i> , No. CV 08-99-M-DWM, 2009 WL 10656999 (D. Mont. Nov. 17, 2009)	18
6		
7	<i>Commodity Futures Trading Comm'n v. Weintraub</i> , 471 U.S. 343 (1985).....	6
8		
9	<i>Complex Sys., Inc. v. ABN AMRO Bank N.V.</i> , 279 F.R.D. 140 (S.D.N.Y. 2011)	20
10		
11	<i>Hernandez v. Tanninen</i> , 604 F.3d 1095 (9th Cir. 2010).....	19
12		
13	<i>Ideal Elec. Co. v. Flowserve Corp.</i> , 230 F.R.D. 603 (D. Nev. 2005).....	6, 16, 17
14		
15	<i>In re County of Erie</i> , 473 F.3d 413 (2d Cir. 2007).....	7
16		
17	<i>Int'l Cards Co. v. Mastercard Int'l Inc.</i> , No. 13-CV-02576 LGS SN, 2014 WL 4357450 (S.D.N.Y. Aug. 27, 2014)	20
18		
19	<i>Phillips v. C.R. Bard, Inc.</i> , 290 F.R.D. 615 (D. Nev. 2013).....	18
20		
21	<i>Premiere Digital Access, Inc. v. Cent. Tel. Co.</i> , 360 F. Supp. 2d 1168 (D. Nev. 2005)	6, 7, 19
22		
23	<i>Regents of Univ. of California v. Micro Therapeutics, Inc.</i> , 2007 WL 2069946 (N.D. Cal. 2007)	20
24		
25	<i>Robert Bosch LLC v. Pylon Mfg. Corp.</i> , 263 F.R.D. 142 (D. Del. 2009).....	20
26		
27	<i>Southeastern Pennsylvania Transport. Auth. v. CaremarkPCS Health, L.P.</i> , 254 F.R.D. 253 (E.D. Pa. 2008).....	17
28		
29	<i>TVT Records v. Island Def Jam Music Grp.</i> , 214 F.R.D. 143 (S.D.N.Y. 2003)	20
30		
31	<i>United States v. Bauer</i> , 132 F.3d 504 (9th Cir. 1997).....	6
32		

1	<i>United States v. Chen,</i> 99 F.3d 1495 (9th Cir. 1996).....	6
2	<i>United States v. ChevronTexaco Corp.,</i> 241 F. Supp. 2d 1065 (N.D. Cal. 2002)	6
4	<i>United States v. Graf,</i> 610 F.3d 1148 (9th Cir. 2010).....	6
6	<i>Upjohn Co. v. United States,</i> 449 U.S. 383 (1981).....	1, 5, 6
7	RULES	
9	Fed. R. Civ. P. 30(b)(6).....	2, 4

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1 Pursuant to Section 11 of the February 10, 2016 Revised Stipulation and Protective Order
 2 (“Protective Order”), Defendant Zuffa, LLC (“Zuffa”) respectfully submits this opposition to
 3 Plaintiffs’ Motion to Challenge Attorney-Client Privilege (ECF No. 320) (“Plaintiffs’ Motion”).
 4 Plaintiffs have challenged Zuffa’s assertion of attorney-client privilege over documents with
 5 Bates numbers ZFL-0550804, ZFL-1014072, ZFL-1014103, ZFL-1014102, ZFL-1014078, ZFL-
 6 1014049, ZFL-1014047, ZFL-1014045, ZFL-1845337, ZFL-1845335, ZFL-1845332, and ZFL-
 7 1845329. For the reasons discussed below, the Court should deny Plaintiffs’ Motion.

8 **I. INTRODUCTION**

9 Once again, Plaintiffs assert that several documents, which Zuffa has identified as
 10 protected by the attorney-client privilege, do not convey any legal advice or constitute only
 11 business advice. In Plaintiffs’ previous motion challenging privilege (ECF No. 250), Plaintiffs
 12 asserted that a request to in-house counsel about [REDACTED]
 13 [REDACTED]. The Court correctly denied that
 14 motion and should likewise do so here, where Plaintiffs assert similarly strained interpretations of
 15 communications between Zuffa’s employees and its in-house counsel. For example, Plaintiffs
 16 claim that in-house counsel’s [REDACTED]
 17 [REDACTED]. By making these
 18 assertions, Plaintiffs ignore the context of the communications at issue, which involve either:
 19 (1) advice by in-house counsel on the legal effect of revising contractual language or (2) an
 20 assessment of Zuffa’s contractual obligations. Under Plaintiffs’ understanding of the attorney-
 21 client privilege, virtually every communication of in-house counsel would be discoverable as
 22 business advice. Yet the Supreme Court has rejected this position and held that the attorney-
 23 client privilege covers communications between in-house attorneys and a company’s employees.
 24 *See generally Upjohn Co. v. United States*, 449 U.S. 383 (1981). In each of the privileged
 25 documents, a Zuffa executive asks an in-house attorney to assess a specific legal problem. In
 26 each of these communications, Zuffa’s in-house attorney provides his legal advice to his client,
 27 Zuffa. These types of confidential communications by Zuffa’s in-house counsel are protected by
 28 the attorney-client privilege.

1 **II. FACTS**

2 Plaintiffs have brought this dispute concerning two sets of documents that Zuffa clawed
3 back during Plaintiffs' deposition of Zuffa noticed pursuant to Fed. R. Civ. P. 30(b)(6).

4 **A. The [REDACTED] By In-House Counsel, Michael Mersch, And Related
5 Email Correspondence**

6 The first set of documents Plaintiffs challenge relate to [REDACTED] authored by
7 Michael Mersch, Zuffa's then-Vice President of Business and Legal Affairs and Assistant
8 General Counsel, to Lorenzo Fertitta, Zuffa's then-Chief Executive Officer, [REDACTED]
9 [REDACTED]. *See* Declaration of Kevin E.
10 Rayhill in Support of Plaintiffs' Motion to Challenge Attorney-Client Privilege ("Rayhill
11 Declaration") (ECF No. 320-1), Ex. 4, ZFL-1014049 (ECF No. 320-5); *see also* Declaration of
12 Stacey K. Grigsby in Support of Defendant Zuffa, LLC's Opposition to Plaintiffs' Motion to
13 Challenge Attorney-Client Privilege ("Grigsby Declaration"), Ex. A, Declaration of Ike Lawrence
14 Epstein in Support of Defendant Zuffa, LLC's Opposition to Plaintiffs' Motion to Challenge
15 Attorney-Client Privilege ("Epstein Declaration") ¶ 3.

16 In [REDACTED]

17 [REDACTED]
18 [REDACTED] After Mr. Fertitta received
19 [REDACTED]

20 Mr. Fertitta sent an email to Tracy Long, the Legal Affairs Manager and the Executive Assistant
21 to the General Counsel, Ike Lawrence Epstein, and Assistant General Counsel, Michael Mersch,
22 which [REDACTED]

23 [REDACTED] *See* Rayhill Decl., Ex. 2, ZFL-1014045 (ECF No. 320-3) (email
24 from Mr. Fertitta to Ms. Long); Ex. 7, ZFL-1014102 (response from Ms. Long including her title
25 as "LEGAL AFFAIRS MANAGER & EXECUTIVE ASSISTANT TO IKE LAWRENCE
26 EPSTEIN, EVP & GC & EXECUTIVE ASSISTANT TO MICHAEL MERSCH, SVP & AGC");
27 Ex. 17, ZFL-1014051 (ECF No. 320-18) [REDACTED]).

1 [REDACTED]
2 [REDACTED]
3 [REDACTED] Rayhill Decl., Ex. 6, ZFL-1014078 (ECF No. 320-7); *see also* Epstein Decl. ¶ 5 (describing
4 Ms. Long's role at Zuffa). As Assistant General Counsel, Mr. Mersch [REDACTED]
5 [REDACTED]
6 [REDACTED]. Epstein Decl. ¶ 4.

7 The following morning, Mr. Mersch replied to Mr. Fertitta [REDACTED]
8 [REDACTED]
9 [REDACTED] *See* Rayhill Decl., Ex. 2, ZFL-1014045.

10 Mr. Fertitta then responded to Mr. Mersch's email suggesting that they discuss [REDACTED]
11 the next day. *Id.* Mr. Epstein, Zuffa's then-General Counsel and Mr. Mersch's supervisor,
12 responded to the same email chain and [REDACTED]

13 [REDACTED] *Id.* at Ex. 3; *see also* Epstein Decl. ¶¶ 2-4, 6-7.

14 **B. Email Correspondence Concerning [REDACTED]**
15 [REDACTED]

16 The second set of documents include communications between Mr. Epstein, Zuffa's then-
17 General Counsel, and Randy Klein, Zuffa's former Vice President of Licensing and
18 Merchandising, [REDACTED]
19 [REDACTED]

20 Plaintiffs' Motion collectively refers to these communications [REDACTED]
21 Rayhill Decl. Ex. 9, ZFL-1845329; Ex. 10, ZFL-1845332; Ex. 11, ZFL-1845335; Ex. 12, ZFL-
22 1845337 (ECF Nos. 320-10, 320-11, 320-12, 320-13).

23 On December 24, 2008, Mr. Klein sent a message to Mr. Epstein, soliciting Mr. Epstein's
24 advice [REDACTED]

25 Rayhill Decl., Ex. 12, ZFL-1845337. In this email, Mr. Klein [REDACTED]

26 [REDACTED] *Id.*; *see also id.* [REDACTED]

27 [REDACTED].
28 After laying out what [REDACTED] he closed his message by

1 stating: [REDACTED] In
 2 Mr. Epstein's response, he advised Mr. Klein [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED] *Id.* Mr. Epstein also explained that he copied Zuffa's then-Chief Operating Officer, Kirk
 6 D. Hendrick, [REDACTED] *Id.*

7 **C. Zuffa's Clawback Of The Privileged Documents**

8 On November 30, 2016, during Plaintiffs' deposition of Zuffa's corporate representative
 9 pursuant to Fed. R. Civ. P. 30(b)(6), Plaintiffs' counsel attempted to introduce documents bearing
 10 Bates numbers ZFL-1014072 and ZFL-1845329. Grigsby Decl. ¶¶ 3, 5. Zuffa's counsel
 11 immediately clawed back both document under the terms of Section 11 of Protective Order. *Id.*
 12 After the conclusion of the testimony that day, Zuffa's counsel undertook an immediate
 13 investigation to determine whether any related privileged documents had been inadvertently
 14 produced. *Id.* ¶¶ 4, 6. As a result of this initial investigation, Zuffa's counsel sent Plaintiffs'
 15 counsel a letter clawing back a total of six documents on November 30, 2016, *id.* ¶ 7, and sent a
 16 second letter on December 5, 2016, clawing back six additional documents, *id.* ¶¶ 8-10. The
 17 documents listed in the November 30 and December 5 letters were all duplicates of, or related
 18 email threads to, the two documents that Zuffa clawed back during the deposition.

19 On December 8, 2016, the parties participated in a telephonic meet-and-confer
 20 conference. At that conference, Zuffa agreed to withdraw its assertion of privilege over the
 21 document bearing Bates number ZFL-1014051. *See* Rayhill Decl. ¶ 20. Zuffa and Plaintiffs,
 22 however, could not reach an agreement concerning the following documents that have become
 23 the subject of Plaintiffs' Motion.

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 26
 27
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	Description	Bates Numbers (ECF No.)	Rayhill Decl. Ex.
1	2 October 23, 2012 [REDACTED] from Michael 3 Mersch to Lorenzo Fertitta [REDACTED] 3 [REDACTED])	4 ZFL-0550804 (320-2); ZFL-1014072 (320-6)	5 1, 5
6	7 October 22-24, 2012, Email Exchange between Tracy 8 Long, Lorenzo Fertitta, and Lawrence Epstein	9 ZFL-1014103 (320-9); ZFL- 1014102 (320-8); ZFL-1014078 (320-7); ZFL- 1014049 (320-5); ZFL-1014047 (320-4); ZFL- 1014045 (320-3)	11 2-4, 6-8
10	11 December 24, 2008 Email Exchange between Randy 12 Klein, Lawrence Epstein, Kirk Hendrick, [REDACTED] 13 [REDACTED] 14	15 ZFL-1845337 (320-13); ZFL-1845335 (320-12); ZFL-1845332 (320-11); ZFL-1845329 (320-10)	16 9-12

15
16 **III. ARGUMENT**

17 **A. Legal Standard**

18 “The attorney-client privilege is the oldest of the privileges for confidential
19 communications known to the common law.” *Upjohn Co.*, 449 U.S. at 389 (citation omitted). In
20 protecting confidential communications between a party and its attorney from disclosure, the
21 privilege encourages “full and frank communication between attorneys and their clients and
22 thereby promote[s] broader public interests in the observance of law and administration of
23 justice.” *Id.*

24 Whether a communication falls within the scope of the privilege turns on whether the
25 communication either seeks or renders legal advice. Courts have recognized the existence of the
26 privilege “where legal advice of any kind is sought from a professional legal advisor in her
27 capacity as a legal advisor concerning communications relating to that purpose, made in
28 confidence by the client.” *Brincko v. Rio Properties, Inc.*, 278 F.R.D. 576, 583 (D. Nev. 2011).

1 The Ninth Circuit has adopted an eight-part test to determine if the attorney-client
 2 privilege protects information:

3 (1) Where legal advice of any kind is sought (2) from a professional
 4 legal adviser in his capacity as such, (3) the communications
 5 relating to that purpose, (4) made in confidence (5) by the client,
 6 (6) are at his instance permanently protected (7) from disclosure by
 7 himself or by the legal adviser, (8) unless the protection [is] waived.

8 *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010) (citation omitted). A party asserting
 9 the privilege bears the burden of establishing that the elements of privilege are met. *United States*
v. Bauer, 132 F.3d 504, 507 (9th Cir. 1997).

10 “[T]he attorney-client privilege attaches to corporations as well as to individuals.”
 11 *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985) (citing *Upjohn*,
 12 449 U.S. 383). “Both for corporations and individuals, the attorney-client privilege serves to
 13 promote full and frank communications between attorneys and their clients.” *Id.* “The Supreme
 14 Court has held that a corporation’s in-house counsel qualifies as an attorney for purposes of the
 15 attorney-client privilege.” *Premiere Digital Access, Inc. v. Cent. Tel. Co.*, 360 F. Supp. 2d 1168,
 16 1175 (D. Nev. 2005) (citing *Upjohn*, 449 U.S. at 394). The privilege extends to various types of
 17 legal advice that an in-house attorney may provide, and “applies to communications between
 18 lawyers and their clients when the lawyers act in a counseling and planning role” *Ideal Elec.*
 19 *Co. v. Flowserve Corp.*, 230 F.R.D. 603, 607 (D. Nev. 2005) (citing *United States v. Chen*, 99
 20 F.3d 1495, 1501 (9th Cir. 1996)). Where the client is a corporation, “any advice sought by its
 21 representatives will obviously be, on some level, for purposes of how that corporation should
 22 conduct its business. However . . . where . . . the primary purpose of the communication is to
 23 discern the legal ramifications of a potential course of action, that communication is for a ‘legal
 24 purpose.’” *Premiere Digital*, 360 F. Supp. 2d at 1174 (D. Nev. 2005); *accord United States v.*
 25 *ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002). The inquiry into the
 26 question of whether a communication has a legal purpose generally is not amenable to bright line
 27 rules. *Upjohn*, 449 U.S. at 396.

1 **B. Mr. Mersch's [REDACTED] Is Privileged**

2 Plaintiffs parse each statement in the [REDACTED]

3 [REDACTED] to bolster their argument that the primary purpose of the documents “[i]s [t]o [o]btain
4 [o]r [p]rovide [b]usiness [a]dvice....” Pl. Mot. at 5. This position stands at odds with the genesis
5 of this document. Mr. Mersch [REDACTED]6 [REDACTED] Rayhill
7 Decl., Ex. 2, ZFL-1014045. As Zuffa’s in-house counsel, Mr. Mersch [REDACTED]8 [REDACTED]
9 [REDACTED] This legal analysis and advice is exactly the type of
10 communication that the attorney-client privilege protects.11 Courts have emphasized that the particular *format* of the legal advice does not control the
12 attorney-client privilege analysis. A forwarded email or a short message, even if it does not
13 include extensive citations to cases and statutes may warrant the attorney-client privilege
14 protection as long as the *content* demonstrates that the attorney is providing legal advice. *See*,
15 e.g., *In re County of Erie*, 473 F.3d 413, 420-21 (2d Cir. 2007). For example, in *Premiere Digital*
16 *Access, Inc. v. Central Telephone Company*, the Court ruled that the attorney-client privilege
17 covered e-mails forwarded to a company’s in-house counsel from company employees that
18 “contained in-house counsel’s recommendation as to how Sprint [the company] should proceed in
19 terminating the service of a different customer.” 360 F. Supp. 2d at 1171. Of particular
20 importance, the Court noted that “th[e] communication was made between a Sprint employee in
21 the scope of his employment and Sprint’s in-house counsel acting in his capacity as such for the
22 purpose of securing legal advice.” *Id.* at 1175. Accepting a contrary view “would essentially
23 render unprotected any communication that occurred between attorney and client prior to the start
24 of preparation for litigation.” *Id.*25 **1. The [REDACTED] From Zuffa’s In-House Counsel
26 To Zuffa’s CEO Is A Legal Analysis Of Contractual Language**27 Mr. Mersch’s [REDACTED] is representative of a core function of an in-house attorney –
28 to provide legal advice to an organization’s employees [REDACTED]

1 [REDACTED] . Mr. Mersch [REDACTED]

2 [REDACTED] in his role as Assistant General Counsel. Epstein Decl.

3 ¶ 4. In [REDACTED] Mr. Mersch does not merely recount Zuffa's business objectives [REDACTED]

4 [REDACTED], but counsels Mr. Fertitta on:

5 • [REDACTED]

6 Section of [REDACTED]

7 Rayhill Decl., Ex. 1, ZFL-0550804-808 and
Ex. 5, ZFL-1014072-76

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

1	Section of [REDACTED]	[REDACTED]
2	Rayhill Decl., Ex. 1, ZFL-0550804-808 and Ex. 5, ZFL-1014072-76	[REDACTED]
3	[REDACTED]	[REDACTED]
4		[REDACTED]
5		[REDACTED]
6		[REDACTED]
7		[REDACTED]
8		[REDACTED]
9	[REDACTED]	[REDACTED]
10	[REDACTED]	[REDACTED]
11	[REDACTED]	[REDACTED]
12		[REDACTED]
13		[REDACTED]
14		[REDACTED]
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1 • [REDACTED]

2 Section of [REDACTED]

3 Rayhill Decl., Ex. 1, ZFL-0550804-808 and

4 Ex. 5, ZFL-1014072-76

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26

27

28

1	• [REDACTED]	[REDACTED]
2	Section of Rayhill Decl., Ex. 1, ZFL-0550804-808 and Ex. 5, ZFL-1014072-76	Examples of [REDACTED]
3	[REDACTED]	[REDACTED]
4	[REDACTED]	[REDACTED]
5	[REDACTED]	[REDACTED]
6	[REDACTED]	[REDACTED]
7	[REDACTED]	[REDACTED]
8	[REDACTED]	[REDACTED]
9	[REDACTED]	[REDACTED]
10	[REDACTED]	[REDACTED]
11	[REDACTED]	[REDACTED]
12	[REDACTED]	[REDACTED]
13	[REDACTED]	[REDACTED]
14	[REDACTED]	[REDACTED]
15	[REDACTED]	[REDACTED]
16	[REDACTED]	[REDACTED]
17	[REDACTED]	[REDACTED]
18	[REDACTED]	[REDACTED]
19	[REDACTED]	[REDACTED]
20	[REDACTED]	[REDACTED]
21	[REDACTED]	[REDACTED]
22	[REDACTED]	[REDACTED]
23	[REDACTED]	[REDACTED]
24	[REDACTED]	[REDACTED]
25	[REDACTED]	[REDACTED]
26		
27		
28		

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]

17 As the above list illustrates, [REDACTED] Mr. Mersch provides his legal analysis on the
18 effect of proposed contractual changes and advice as to whether Mr. Fertitta should [REDACTED]

19 [REDACTED]
20 [REDACTED] This primary purpose of this communication plainly is to convey legal,
21 not merely business, advice.

22 In challenging this document, Plaintiffs ignore this Court's prior ruling on a nearly
23 identical issue. During the May 17, 2016 status conference, the Court considered Plaintiffs'
24 challenge to Zuffa's assertion of attorney-client privilege over a communication between a lawyer
25 and his supervising attorney and a high-level executive, requesting feedback on draft language to
26 be inserted into a contract. Zuffa's Opp'n to Pls.' Mot. To Challenge Privilege Designation (ECF
27 No. 256) at 1. At the May 17, 2016 hearing, the Court questioned Plaintiffs' position that an
28

1 exchange between an attorney and his client requesting advice about contractual language may
2 not be privileged:

3 MR. RAYHILL: Okay. So the document in question is an e-mail
4 from an UFC attorney, Michael Mersch, to other UFC executives,
5 and it concerns a language in a contract. And the language has to do
6 with a bonus clause. It just quotes the clause itself, which
7 apparently is language that was suggested by the fighter. It is not –

8 THE COURT: Counsel for the fighter.

9 MR. RAYHILL: I believe it was -- yeah. Okay. Counsel for the
10 fighter. And the attorney, Michael Mersch, simply asks, Are we
11 okay with this language, to the two Zuffa executives. So it's clearly
12 strictly a business purpose. It's a straight-up contract negotiation.
13 There are no legal issues raised. It has strictly to do with the amount
14 of money –

15 THE COURT: Where -- how do you get that read from looking at
16 it? Are we okay with this language?

17 MR. RAYHILL: Well, the language is about the – the language is
18 proposed by the fighter, and the language is about the amount of
19 money that's going to be included in this bonus clause.

20 . . .

21 THE COURT: If your client writes you a letter and says, "Here's a
22 contract that I've been handed. Can I sign this? Is he or she asking
23 you for legal advice?"

24 MR. RAYHILL: Well, that's not what the e-mail says. In that case
25 I think it would depend on the circumstances of the contract and the
26 circumstances of the letter. Maybe the – my client is asking, Am I
27 getting enough money? In which case the answer is it is not
28 privileged. If the client is saying, "Am I exposing myself to
liability, legal liability," then the answer is it's privileged.

So without knowing the context, I think it's impossible to
answer one way or another. It really depends on what the client is
asking. And in this case the client is asking, Do we want to pay the
amount --

May 17, 2016 Status Conference Tr. ("Status Conf. Tr.") 9:17-10:10, 15:16-16:4 (ECF No. 269).

After brief additional discussion, the Court denied Plaintiffs' privilege challenge, holding that
"[t]he document is privileged." *Id.* at 20:15-16.

1 The legal issue here is no different than the one argued during the May 17, 2016 Status
 2 Conference. Here, [REDACTED]
 3 [REDACTED] Mr. Fertitta [REDACTED] to his attorney, Mr. Mersch, to seek
 4 legal advice, essentially asking Mr. Mersch [REDACTED] Mr. Fertitta's
 5 choice to send these changes to Zuffa's legal department, rather than its Chief Operating Officer,
 6 indicates that Mr. Fertitta wanted legal, not business, advice. Acting in his role as Assistant
 7 General Counsel, Mr. Mersch responded to Mr. Fertitta's request by providing his legal opinion
 8 on [REDACTED] Indeed, some of the responses
 9 that Plaintiffs cast as "business advice" would make little sense from a non-lawyer. For example,
 10 [REDACTED]
 11 [REDACTED]. *See, e.g.*, [REDACTED]
 12 [REDACTED] He, however, notes that as a legal matter, [REDACTED]
 13 [REDACTED]
 14 [REDACTED] Rayhill Decl. Ex. 1, at ZFL-0550805 ("[REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED"], *id.* ("[REDACTED]
 18 [REDACTED"], *id.* at ZFL-0550806 ("[REDACTED]
 19 [REDACTED]
 20 [REDACTED"]); *id.* at ZFL-0550807
 21 ("[REDACTED]
 22 [REDACTED"]); *id.* at ZFL-
 23 0550808 ("[REDACTED]
 24 [REDACTED"]) Like the
 25 document at issue in the May 17 status conference, the attorney-client privilege protects this
 26 memorandum.

27 Plaintiffs erroneously claim all Mr. Mersch's statements apart from a single sentence are
 28 not privileged because they: are descriptive; lack a legal justification; fall into the category of

1 “past performance”; or qualify as business advice. Pls.’ Mot. at 6-16. This categorization ignores
 2 the substance [REDACTED]

3 [REDACTED], *what* the legal
 4 implications of these changes would be, and *whether* Zuffa should [REDACTED]

5 [REDACTED] Although Plaintiffs attempt to dissect and weigh each statement
 6 in isolation, they fail to appreciate that [REDACTED]
 7 [REDACTED]

8 [REDACTED] Rayhill Decl., Ex. 2, ZFL-1014045. This analysis is legal in nature.
 9 And Plaintiffs’ suggested characterizations cannot transform attorney-client privileged material
 10 into unprivileged business advice.

11 **2. The [REDACTED] Is**
 12 **Privileged**

13 Separately, Plaintiffs argue that [REDACTED] is not privileged
 14 because it [REDACTED]

15 [REDACTED] Pls.’ Mot. at 5. Even a cursory review of the
 16 document belies this assertion. The [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED] Rayhill Decl., Exs. 1 & 5, at ZFL-0550804 and ZFL-
 20 1014072; *see also* Ex. 4 at ZFL-1014049.

21 Mr. Mersch’s [REDACTED] reflects his legal opinion regarding what he
 22 believed [REDACTED]

23 [REDACTED] In this [REDACTED]
 24 [REDACTED] For example, [REDACTED]
 25 [REDACTED]
 26 [REDACTED]

27 [REDACTED] Rayhill Decl., Exs. 1 & 5, at ZFL-0550804 and
 28 ZFL-1014072. By contrast, he [REDACTED]

1 [REDACTED]
 2 Rayhill Decl., Ex. 17 at ZFL-1014053 ([REDACTED])
 3 [REDACTED] . Mr. Mersch also omitted several other [REDACTED]
 4 [REDACTED] *E.g., id.* at
 5 ZFL-1014051 ([REDACTED]) and ZFL-1014051 ([REDACTED])
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]).

9 What Plaintiffs describe as a [REDACTED] is actually a
 10 legal analysis of the most important aspects of [REDACTED] To
 11 accept Plaintiff's argument that Mr. Mersch's advice to Zuffa was not legal in nature is to believe
 12 [REDACTED]
 13 [REDACTED]. Yet Plaintiffs have not gone as far as to
 14 suggest that [REDACTED]. Mr. Mersch's decision to
 15 include certain facts and to omit certain other facts in [REDACTED] provides insight into his legal
 16 opinions regarding [REDACTED]
 17 should be evaluated. *See Ideal Elec.*, 230 F.R.D. at 607 (finding that the attorney-client privilege
 18 covers "communications with respect to how the facts should be presented"). It is therefore
 19 properly protected by the attorney-client privilege.

20 Zuffa has properly asserted the privilege applies to the [REDACTED]
 21 [REDACTED]

22 **C. The E-mails Related To Mr. Mersch's [REDACTED] Contain Privileged**
 23 **Attorney-Client Communications**

24 Plaintiffs also dispute that the email communications concerning Mr. Mersch's [REDACTED]
 25 [REDACTED] arguing that the emails do not "refer to legal concepts,
 26 strategy or advice." Pls.' Mot. at 17. This is incorrect. Zuffa asserts privilege only over emails
 27 that communicate a confidential request for advice, include privileged advice, or respond to that
 28 advice.

1 Mr. Mersch and Ms. Long's responses to Mr. Fertitta's request for legal advice are
 2 privileged. It is well-settled that a communication by an attorney in response to a request by an
 3 employee of an organization for legal advice is covered by the attorney-client privilege. *See Ideal*
 4 *Elec.*, 230 F.R.D. at 607 (explaining that the attorney-client privilege "applies to communications
 5 between lawyers and their clients when the lawyers act in a counseling and planning role")
 6 (citation omitted). It is also well-settled that "[c]ommunications with the subordinate of an
 7 attorney, such as a paralegal, are also protected by the attorney-client privilege so long as the
 8 subordinate is acting as the agent of a duly qualified attorney under circumstances that would
 9 otherwise be sufficient to invoke the privilege." *Southeastern Pennsylvania Transport. Auth. v.*
 10 *CaremarkPCS Health, L.P.*, 254 F.R.D. 253, 257 (E.D. Pa. 2008) (citation and quotation marks
 11 omitted).

12 At Zuffa, Ms. Long, acting as Legal Affairs Manager and the Executive Assistant to Mr.
 13 Mersch and Mr. Epstein, [REDACTED]
 14 [REDACTED]
 15 [REDACTED] Epstein Decl.

16 ¶¶ 5-6. These portions of the e-mails are privileged because Ms. Long was acting under the
 17 supervision of Mr. Epstein as General Counsel and, in her own words, [REDACTED]
 18 [REDACTED]. *See* Rayhill Decl., Ex. 6 at ZFL-1014078; *see also* CaremarkPCS, 254 F.R.D. at 257.

20 As to Mr. Mersch's [REDACTED] that communication is
 21 privileged for the reasons discussed above, namely that it conveys legal advice from an attorney
 22 to his client. *See* Section III.B *supra*. The [REDACTED]
 23 [REDACTED]

24 [REDACTED] That portion of ZFL-1014049 is privileged. Likewise, Mr. Epstein's [REDACTED]
 25 [REDACTED] is also privileged legal advice – Mr. Epstein was acting in his role as General
 26 Counsel and providing his legal impressions of Mr. Mersch's [REDACTED]

27 [REDACTED] Epstein Decl. ¶ 7. Finally, Mr. Fertitta's
 28

1 response to Mr. Mersch's [REDACTED] is a response to Mr. Mersch's legal
 2 advice, and, as such, is privileged.

3 In sum, the email communications discussing Mr. Mersch's [REDACTED]
 4 [REDACTED] are privileged.

5 **D. The [REDACTED] Contain Privileged Attorney-Client
 6 Communications, And Zuffa Did Not Waive That Privilege**

7 **1. The [REDACTED] Contain Privileged Attorney-Client
 8 Communications**

9 In attacking Zuffa's assertion of attorney-client privilege over [REDACTED],
 10 Plaintiffs again seek to decontextualize privileged statements and, in doing so, distract from their
 11 clearly privileged nature. The only relevant questions are if Mr. Klein's purpose was to solicit
 12 legal advice, and whether Mr. Epstein's purpose was to render legal advice. The context of the
 13 [REDACTED] demonstrates that the answer to both questions is yes.

14 The identity of the participants in the email chain shows that Mr. Klein's request was a
 15 legal one, not a business one. Mr. Klein's initial email did not include any of the non-lawyer
 16 employees or executives who are [REDACTED]

17 [REDACTED] Mr. Klein did not address his inquiry [REDACTED]
 18 [REDACTED]. Mr. Klein did not merely copy in-house counsel on
 19 a request to others. Instead, Mr. Klein emailed Mr. Epstein directly and did not copy anyone.
 20 Mr. Klein's choice to email the company's top lawyer—and only a lawyer—refutes Plaintiffs'
 21 position that this email communication is a discussion of business issues. *Cf. Phillips v. C.R.
 22 Bard, Inc.*, 290 F.R.D. 615, 657 (D. Nev. 2013) (limiting distribution of communication of
 23 request to in-house counsel for legal advice favors finding of privilege); *Churchill v. Trinity
 24 Universal Ins. Co.*, No. CV 08-99-M-DWM, 2009 WL 10656999, at *3 (D. Mont. Nov. 17, 2009)

25 (holding that documents were properly withheld where they were "for legal purposes limited to
 26 where . . . in-house counsel was the author or recipient" as opposed to being copied). Their own
 27 *ipse dixit* aside, nothing in the email chain supports Plaintiffs' position that the e-mail chain
 28 addresses only a "pure business purpose" rather than a request for legal advice. To the contrary,

1 the e-mails indicate that Mr. Klein's purpose was to request legal advice, which Mr. Epstein
 2 provided.

3 The privileged portions of the [REDACTED]

4 [REDACTED]
 5 [REDACTED] In fact, [REDACTED]
 6 [REDACTED]
 7 [REDACTED] Epstein Decl. ¶ 10 & Grigsby Decl., Ex. C. In the course of [REDACTED]
 8 [REDACTED]
 9 [REDACTED] Grigsby Decl., Ex.

10 C at ZFL-1153898. In the [REDACTED], Mr. Epstein provided his legal advice
 11 regarding [REDACTED] Epstein Decl. ¶ 11. As Mr. Epstein
 12 was, at Mr. Klein's request, providing his legal interpretation of the effect of the contractual
 13 agreement in force with [REDACTED] at the time, Mr. Epstein's response, Mr. Klein's request, and
 14 Mr. Klein's response to Mr. Epstein's advice are all privileged communications. As explained
 15 above, this type of request by an employee and advice by an in-house attorney are protected by
 16 the attorney-client privilege. Plaintiff's naked assertions aside, Mr. Klein sought and Mr. Epstein
 17 provided legal advice [REDACTED]

18 [REDACTED] and Plaintiffs have not provided any evidence otherwise. *Premiere Digital*, 360 F.
 19 Supp. 2d at 1174 ("As this client is a corporation, any advice sought by its representatives will
 20 obviously be, on some level, for the purposes of determining how that corporation should conduct
 21 its business. However, the Court finds that where, as here, the primary purpose of the
 22 communication is to discern the legal ramifications of a potential course of action, that
 23 communication is for a 'legal' purpose.").

24 **2. Zuffa's Production Of Business Communications On The Same
 25 Subject Does Not Waive Privilege**

26 Plaintiffs also argue Zuffa waived privilege over the redacted portions of the [REDACTED]
 27 [REDACTED] by producing unredacted portions of the documents. The flaw in this argument is
 28 simple: Because the unredacted portions of the documents are not privileged, no waiver can

1 result from their production. Plaintiffs' theory would perversely penalize Zuffa for carefully
 2 distinguishing between privileged and non-privileged aspects of the communication in redacting
 3 the documents and would encourage overbroad privilege claims. Federal law dictates that only
 4 "[d]isclosing a privileged communication . . . results in waiver as to all other communications on
 5 the same subject." *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010) (citations
 6 omitted). Neither side disputes whether the unredacted communications contain privileged
 7 information; they do not. The unredacted communications are [REDACTED]
 8 [REDACTED], as opposed to
 9 Mr. Klein directly seeking legal advice from Mr. Epstein, Mr. Epstein responding with that legal
 10 advice, and Mr. Klein directly responding to Mr. Epstein's legal advice. Where unredacted
 11 portions of a document reveal "only factual information . . . and contain[ed] no component of
 12 legal analysis," their disclosure does not waive privilege as to the redacted portions of those same
 13 documents. *Regents of Univ. of California v. Micro Therapeutics, Inc.*, 2007 WL 2069946, at *3
 14 (N.D. Cal. 2007); *see Robert Bosch LLC v. Pylon Mfg. Corp.*, 263 F.R.D. 142, 150 (D. Del. 2009)
 15 (finding that "disclosed parts of [] unredacted documents" that did not "contain any advice of
 16 counsel" did not waive attorney-client privilege as to the redacted portions of those same
 17 documents). Zuffa's disclosure of these unredacted communications that include non-privileged
 18 statements cannot constitute a waiver of privilege as to the redacted communications on this
 19 subject, which contain legal advice sought and received from counsel.

20 Courts routinely allow or order redactions where documents contain a mix of protected
 21 privileged communications and business advice. *See, e.g., TTV Records v. Island Def Jam Music*
 22 *Grp.*, 214 F.R.D. 143, 146 (S.D.N.Y. 2003) (allowing redaction of legal advice in emails that had
 23 a mixture of legal and business advice.); *Complex Sys., Inc. v. ABN AMRO Bank N.V.*, 279 F.R.D.
 24 140, 150-51 (S.D.N.Y. 2011) (same); *Int'l Cards Co. v. Mastercard Int'l Inc.*, No. 13-CV-02576
 25 LGS SN, 2014 WL 4357450 (S.D.N.Y. Aug. 27, 2014) (ordering the redaction of some emails
 26 that had a mix of business related communications and legal communications). The rule
 27 Plaintiffs urge would have absurd consequences. Plaintiffs' argument would mean that where a
 28 party provides a document containing both redacted, privileged legal communications and

1 unredacted, non-privileged business communications, the party has waived privilege as to the
 2 redacted portions of the document. If that were the case, courts would never order parties to
 3 redact documents, but, instead, would either require documents be withheld in their entirety or
 4 disclosed in their entirety. Plaintiffs should not be permitted to use Zuffa's good faith efforts to
 5 distinguish between privileged and non-privileged communications as a sword to defeat Zuffa's
 6 privilege designations.

7 **E. Plaintiffs Will Not Be Prejudiced As A Result of Zuffa's Privilege Claim Over
 8 The Challenged Documents**

9 Plaintiffs argue that they would be prejudiced by Zuffa's withholding or redacting the
 10 Challenged Documents as protected by attorney-client privilege. Pls.' Mot. at 23. As to the
 11 [REDACTED] and the related emails, the Court's question on a similar
 12 issue at the May 17, 2016 status conference is instructive: "THE COURT: How are they
 13 protecting it if they produce the proposal from the fighter and the response and final draft?"
 14 Status Conf. Tr. 18:13-14. As to [REDACTED] Zuffa
 15 has provided Plaintiffs with an enormous number of [REDACTED]
 16 and has provided, as with [REDACTED]
 17 [REDACTED]
 18 [REDACTED]

19 Specifically as to [REDACTED] Zuffa has produced: (1) [REDACTED]
 20 [REDACTED] Rayhill Decl., Ex. 17, ZFL-1014051; (2) the
 21 [REDACTED], Grigsby Decl., Ex.
 22 B; and (3) other documents [REDACTED]
 23 [REDACTED]. In addition to testimony they will take during numerous depositions with a wide range
 24 of Zuffa employees, former employees, and third parties, Plaintiffs have enough information and
 25 documentation from Zuffa's productions such that they are not prejudiced by the withholding and
 26 redaction of Zuffa's privileged information.

27 Plaintiffs have simply not been prejudiced and will not be prejudiced if the privileged
 28 documents are withheld.

1 **IV. CONCLUSION**

2 Zuffa respectfully requests that the Court deny Plaintiffs' challenge to attorney-client
3 privilege.

4

5 Dated: January 3, 2017

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7 BOIES, SCHILLER & FLEXNER LLP

8

9 By: /s/ Stacey K. Grigsby

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing **DEFENDANT ZUFFA, LLC'S OPPOSITION TO PLAINTIFFS' MOTION TO CHALLENGE ATTORNEY-CLIENT PRIVILEGE (ECF No. 320)** was served on January 3, 2017 via the Court's CM/ECF electronic filing system addressed to all parties on the e-service list.

/s/ Christina Seki

Christina Seki, an Employee of Boies, Schiller & Flexner, LLP